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TIME FOR JUDICIAL ENFORCEMENT OF ESA RECOVERY PLANS? . . . “WHEN [SQUIRRELS] FLY”

MICHAEL DEIULIS*

Abstract: In August 2008, the U.S. Fish and Wildlife Service published a final rule in the Federal Register officially removing the West Virginia northern flying squirrel from the List of Threatened and Endangered Wildlife, approximately twenty-three years after it was originally listed. The flying squirrel’s delisting proved quite controversial and many environmentalists challenged the agency’s decision for violating of the Endangered Species Act. The D.C. Circuit, in *Friends of Blackwater v. Salazar*, nevertheless upheld the FWS’s delisting decision, finding that ESA recovery plans merely provide non-binding guidance. This Comment argues that although the D.C. Circuit decided the case correctly on the basis of proper statutory interpretation and adherence to common law precedent, the practical implications of this decision create significant cause for concern. Congress should therefore amend the ESA to impart legal enforceability on recovery plans if it wishes provide endangered species with a heightened degree of protection.

INTRODUCTION

The environmental community can breathe a collective sigh of relief knowing that one of our country’s oldest native species, dating as far back as the ice ages, has narrowly avoided suffering the same perilous fate as the mastodons of eras past—at least for now.¹ The imposition of federal protections, combined with an innate resiliency, has facilitated the West Virginia northern flying squirrel’s recovery from the brink of certain extinction.² Nevertheless, it is unlikely that many outside the environmental community have ever heard of, let alone seen,

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¹ See Complaint for Declaratory and Injunctive Relief at 13, 16–17, *Friends of Blackwater v. Salazar*, 772 F. Supp. 2d 232 (D.D.C. 2011) (No. 1:09-cv-02122); U.S. FISH & WILDLIFE SERV., WEST VIRGINIA NORTHERN FLYING SQUIRREL: GLAUCOMYS SABRINUS FUSCUS 1 2006, available at <http://www.fws.gov/northeast/pdf/flyingsq.pdf>.

² See U.S. FISH & WILDLIFE SERV., *supra* note 1. But see Complaint, *supra* note 1.

these peculiar critters in the flesh—and for good reason.³ The West Virginia northern flying squirrel is a nocturnal rodent that lives in small, secluded clusters at high altitudes within the densely forested habitats of the central Appalachian Mountains.⁴ Unsurprisingly, these squirrels are not frequently spotted soaring across the West Virginia sky, not only because of their rarity, secretive disposition, and isolated habitat—but perhaps more logically, because they are actually flightless.⁵ The flying squirrel weighs less than five ounces, has a broad, flat tail, and can “pull the loose folds of skin (patagia) between [its] fore and hind legs taut,” creating a parachute-like effect that enables it to glide from limb to limb.⁶

The advent of widespread industrial logging in the 1880s, contributed in large part to the decimation of the flying squirrel’s natural habitat and pushed the species, whose expected lifespan is only three to four years, to the brink of extinction.⁷ It is within this context that the U.S. Fish & Wildlife Service (FWS) made the initial decision to place the West Virginia northern flying squirrel on the endangered species list in 1985.⁸ Some twenty years later, the FWS divisively decided to delist the species pursuant to a review of data gathered from a comprehensive scientific investigation.⁹ Many environmental organizations cried foul in the immediate aftermath of this decision and eventually responded by filing suit to challenge the FWS’s delisting.¹⁰ What en-

³ U.S. FISH AND WILDLIFE SERV., APPALACHIAN NORTHERN FLYING SQUIRRELS RECOVERY PLAN 11 (1990), *available at* http://www.fws.gov/ecos/ajax/docs/recovery_plans/1990/900924c.pdf [hereinafter RECOVERY PLAN].

⁴ U.S. FISH & WILDLIFE SERV., *supra* note 1.

⁵ RECOVERY PLAN, *supra* note 3; News Release, U.S. Fish & Wildlife Serv., Squirrel Ready to Fly Solo: Endangered Species’ Future Looks Bright (June 2, 2006), *available at* <http://www.greenenvironmentnews.com/Environment/Wildlife/Squirrel+ready+to+fly+solo%3A+Endangered+species%27+future+looks+bright>.

⁶ U.S. FISH & WILDLIFE SERV., *supra* note 1.

⁷ See RECOVERY PLAN *supra* note 3, at 12–13; U.S. FISH & WILDLIFE SERV., *supra* note 1.

⁸ Determination of Endangered Status for Two Kinds of Northern Flying Squirrel, 60 Fed. Reg. 26,999, 26,999 (July 1, 1985) (codified at 50 C.F.R. pt. 17).

⁹ Proposed Rule to Remove the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife, 71 Fed. Reg. 75,924, 75,924 (Dec. 19, 2006) (codified 50 C.F.R. pt. 17); *see* Final Rule Removing the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 50,226, 50,227 (Aug. 26, 2008) (codified 50 C.F.R. pt. 17). During the 120-day comment period the FWS received a total of 4808 public comments, the majority of which opposed the proposed delisting. *Id.* The “Virginia northern flying squirrel (*Glaucomys sabrinus fuscus*), now more commonly known as the West Virginia northern flying squirrel.” *Id.*

¹⁰ Final Rule Removing the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. at 50,5227; *see* Friends of Blackwater v. Salazar, 691 F.3d 428 (D.C. Cir. 2012).

sued was a legal battle involving an exhaustive exercise in statutory interpretation, which called into question the meaning of certain provisions of the Endangered Species Act (ESA).¹¹

The U.S. District Court for the District of Columbia's affirmation in 2012 of the FWS's decision to delist the West Virginia northern flying squirrel in *Friends of Blackwater v. Salazar* demonstrates how proper statutory construction does not always lead to desirable outcomes.¹² This Comment argues that although the D.C. Circuit properly interpreted common law precedent and the ESA's plain meaning to decide the case, the resultant implications create cause for concern.¹³ As a consequence, "[w]hether the balance between enforceable procedural duties to prepare recovery plans and unenforceable recovery plan requirements is adequate to conserve endangered species remains an open question."¹⁴ Accordingly, this Comment suggests that an amendment is necessary if the legislature intended—contrary to what it drafted—for recovery plans to be legally binding.¹⁵

I. FACTS AND PROCEDURAL HISTORY

In 1985, scientists studying the West Virginia northern flying squirrel became increasingly alarmed when tracking efforts yielded only ten specimens in the counties of Randolph and Pocahontas, West Virginia, and two specimens in Highland County, Virginia.¹⁶ Although the species' reclusive nature no doubt contributed to researchers' inability to successfully collect and study a higher volume of specimens, the FWS was nevertheless sufficiently concerned to take action.¹⁷ Attributing the squirrel's decline to the combined effects of habitat destruction, pathogens, exotic pests, acid rain, synergistic chemical effects, and the proliferation of competitors, the FWS ultimately decided to place the

¹¹ See 16 U.S.C. § 1533(f) (2006); *Friends of Blackwater, v. Salazar*, 691 F.3d 428, 432–52 (D.C. Cir. 2012).

¹² See *infra* notes 115–117 and accompanying text.

¹³ See *infra* notes 115–117 and accompanying text.

¹⁴ Amber Shell Ward, Casenote, *Strahan v. Linnon: A Missed Opportunity for Testing the Use of Section 7(A)(1) As an Action-Forcing Provision*, 4 OCEAN & COASTAL L.J. 311, 330 (1999).

¹⁵ See *infra* notes 119–122 and accompanying text.

¹⁶ U.S. FISH & WILDLIFE SERV., APPALACHIAN NORTHERN FLYING SQUIRRELS RECOVERY PLAN UPDATE 2 (2001), available at http://ecos.fws.gov/docs/recovery_plan/010906.pdf; see *Friends of Blackwater*, 691 F.3d at 430.

¹⁷ See Determination of Endangered Status for Two Kinds of Northern Flying Squirrel, 60 Fed. Reg. 26,999, 26,999 (July 1, 1985) (codified at 50 C.F.R. pt. 17); RECOVERY PLAN, *supra* note 3, at 11.

West Virginia northern flying squirrel on the endangered species list on July 1, 1985.¹⁸

In accordance with the mandates of section 4(f) of the ESA, the FWS formulated a recovery plan geared toward facilitating the “conservation and survival” of the West Virginia northern flying squirrel.¹⁹ The resultant recovery plan included criteria that provided for both the down-listing and delisting of the species contingent upon a showing of satisfactory documentation.²⁰ The first criteria required a finding of stable or expanding squirrel populations “in a minimum of 80% of all Geographic Recovery Areas [(GRA)] designated for the subspecies.”²¹ Second, the plan necessitates an accumulation of sufficient ecological and timber management data “to assure future protection and management” of the species.²² The third recovery criterion calls for GRA management to ensure sufficient habitat capable of promoting both population expansion and habitat corridors for migration among GRAs.²³ Finally, complete delisting would be possible after the FWS also demonstrated that the high altitude forests, essential to the squirrels’ survival, were not threatened by the introduction of pests or environmental pollution.²⁴

Nearly sixteen years later in 2002, the FWS hired a biologist to investigate and assess the species’ status.²⁵ The following year the FWS began drafting a five-year review of the West Virginia northern flying squirrel, which was published in April 2006.²⁶ In this review the FWS stated that previous threats to the squirrel had abated to the point that the species persisted throughout its current range.²⁷ Furthermore, the FWS concluded that the criteria stipulated in the recovery plan in 1990 no longer met current standards for adequacy and needed updating.²⁸ The review noted that scientists had successfully captured 1141 specimens at 105 different sites, as compared to 10 captures at the original

¹⁸ See Determination of Endangered Status for Two Kinds of Northern Flying Squirrel, 60 Fed. Reg. at 26,999; RECOVERY PLAN, *supra* note 3, at 12–15.

¹⁹ *Friends of Blackwater*, 691 F.3d at 430.

²⁰ RECOVERY PLAN, *supra* note 3, at 18.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Friends of Blackwater*, 691 F.3d at 431.

²⁶ See U.S. FISH & WILDLIFE SERV., WEST VIRGINIA NORTHERN FLYING SQUIRREL 5-YEAR REVIEW: SUMMARY AND EVALUATION 2 (2006).

²⁷ *Friends of Blackwater*, 691 F.3d at 431; U.S. FISH & WILDLIFE SERV., *supra* note 26, at 2–3.

²⁸ U.S. FISH & WILDLIFE SERV., *supra* note 26, at 4.

time of listing in 1985.²⁹ The FWS thus recommended commencing the delisting process pursuant to its determination that the species persisted throughout its historical range and no longer qualified as endangered or threatened.³⁰

On August 26, 2008 the FWS published its final rule, effective September 25, 2008, removing the West Virginia northern flying squirrel from the List of Threatened and Endangered Wildlife.³¹ The FWS justified its decision to delist, despite the fact that not all the recovery plan criteria had been met, on the grounds that the criteria were merely intended to provide guidance.³² Moreover, the FWS contended that its decision was partly based on an analysis and satisfaction of the five threat factors outlined in section 4(a)(1) of the ESA.³³

The agency's final decision was the effective equivalent of its proposed rule, which was previously met with considerable opposition—as evidenced by the volume of negative responses received during the mandatory notice and comment period.³⁴ In response to commenters who objected to the FWS's reliance on persistence data as an indicator of population health and stability, the FWS maintained that persistence was the best available indicator given the many obstacles impeding detection of the species.³⁵ The Friends of Blackwater, a nonprofit organization founded in 1987 for the purpose of assisting wildlife refuges in carrying out their public use missions, reacted by filing a suit in the D.C. Circuit.³⁶ On March 25, 2011 the court ruled in favor of the plaintiffs, vacating the FWS's delisting rule and consequently reinstating the federal protections in place prior to the effective date of delisting.³⁷ The district court found that removing the squirrel from the endangered species list, despite the recovery plan criteria remaining out-

²⁹ *Friends of Blackwater*, 691 F.3d at 431; U.S. FISH & WILDLIFE SERV., *supra* note 26, at 7.

³⁰ U.S. FISH & WILDLIFE SERV., *supra* note 26, at 20.

³¹ Final Rule Removing the Virginia Northern Flying Squirrel from the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 50,226, 50,226 (Aug. 26, 2008) (codified 50 C.F.R. pt. 17).

³² *Id.*

³³ *Id.* at 50,227.

³⁴ *Id.* The FWS received a total of 4808 comments, the majority of which were letters objecting to the delisting. *Id.*

³⁵ *Id.*

³⁶ Complaint, *supra* note 1, at 233; *Friends of Blackwater*, FISH & WILDLIFE SERV., <http://www.fws.gov/blackwater/friends.html> (last updated Apr. 26, 2011).

³⁷ *Friends of Blackwater*, 772 F. Supp. 2d at 245; Reinstatement of Listing Protections for the Virginia Northern Flying Squirrel in Compliance with a Court Order, 76 Fed. Reg., 35,349, 35,349 (June 17, 2011) (to be codified 50 C.F.R. pt. 17).

standing, constituted a violation of the ESA.³⁸ The FWS subsequently appealed the court's decision on the grounds that it erred in finding the recovery plan criteria binding.³⁹

II. LEGAL BACKGROUND

The Administrative Procedure Act governs the procedure and scope of judicial review of agency rulemaking.⁴⁰ Under the APA, courts review the administrative record directly and have the power to hold as unlawful and set aside any agency action they deem "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴¹ Courts review agency statutory interpretation under a two-step framework first laid out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴² The initial inquiry considers whether Congress has spoken unambiguously about the precise issue under consideration.⁴³ If it has not, step two obligates the court to defer to the administering agency's interpretation, provided that it reflects a reasonable construction of the statute.⁴⁴

The Endangered Species Act of 1973 (ESA) vastly broadened the scope of the government's management authority over endangered and threatened species on both public and private land.⁴⁵ Congress enacted the ESA for the express purpose of conserving the ecosystems on which endangered and threatened species depend, and providing programs for the conservation of such species.⁴⁶ Generally, the ESA seeks to achieve these goals by means of "a comprehensive set of affirmative mandates, stringent prohibitions, and limited exceptions."⁴⁷

³⁸ See *Friends of Blackwater*, 772 F. Supp. 2d at 245. Instead of applying the precise criteria set forth in the Recovery Plan, the FWS reached its delisting decision on the basis of an analysis of the five listing factors contained in § 1533(a)(1) of the ESA. *Id.* at 238-39; see 16 U.S.C. § 1533(a)(1) (2006).

³⁹ See *Friends of Blackwater*, 691 F.3d at 432.

⁴⁰ 5 U.S.C. § 706 (2006).

⁴¹ *Id.* § 706(2)(A); *Friends of Blackwater v. Salazar*, 691 F.3d, 428, 432 (D.C. Cir. 2012).

⁴² See 467 U.S. 837, 842-43 (1984).

⁴³ *Id.* at 842.

⁴⁴ *Id.* at 842-43.

⁴⁵ ENVTL. LAW INST., OVERVIEW AND STRUCTURE OF THE ESA: GENERALLY, 3 LAW OF ENVTL. PROT. § 23:6 (2012).

⁴⁶ 16 U.S.C. § 1531(b) (2006); see also Presidential Statement on Signing the Endangered Species Act of 1973, 10 WEEKLY COMP. PRES. DOC. 1 (Jan. 7, 1974) ("Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed . . . and it forms a vital part of the heritage we all share as Americans.").

⁴⁷ ENVTL. LAW INST., *supra* note 45.

The ESA charges the Secretary of the Interior with determining whether a species is endangered or threatened.⁴⁸ The Act stipulates that the Secretary must consider five enumerated factors in the listing decision-making process.⁴⁹ Furthermore, the Act instructs the Secretary to make listing determinations “solely on the basis of the *best scientific and commercial data available* to him after conducting a review of the status of the species.”⁵⁰

In a major 1978 amendment to the ESA, Congress mandated that once a species is formally listed, the U.S. Fish & Wildlife Service (FWS) must develop and implement a recovery plan aimed at facilitating the species’ conservation and continued survival.⁵¹ In developing and implementing a recovery plan the Secretary must, to the maximum extent practicable, incorporate “objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list.”⁵² The objective, measurable criteria must directly address the threats that initially prompted the listing.⁵³ Section 4(f) carves out an exception to the recovery plan mandate, providing that the Secretary need not develop or implement a recovery plan if such a plan would not promote conservation of the species.⁵⁴

The vast majority of courts that have confronted the issue have declined to render recovery plans legally enforceable.⁵⁵ For instance, in

⁴⁸ 16 U.S.C. § 1533(a)(1) (2006). The Secretary delegated his responsibilities under the Act to the U.S. Fish & Wildlife Service (FWS). *Friends of Blackwater*, 691 F.3d at 430 n*. Thus, the FWS and the Secretary are used interchangeably in this Comment.

⁴⁹ 16 U.S.C. § 1533(a)(1). The five factors are: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” *Id.*

⁵⁰ *Id.* § 1533(b)(1)(A) (emphasis added).

⁵¹ An Act to Amend the Endangered Species Act of 1973 to Establish an Endangered Species Interagency Committee to Review Certain Actions to Determine Whether Exemptions from Certain Requirements of That Act Should Be Granted for such Actions, Pub. L. No. 95-632, 92 Stat. 3751, (1978) (amending 16 U.S.C. § 1533(f)(1) (2006)); Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 PUB. LAND & RESOURCES L. REV. 55, 70 (1996).

⁵² 16 U.S.C. § 1533(f)(1)(B)(ii).

⁵³ See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 111 (D.D.C. 1995).

⁵⁴ 16 U.S.C. § 1533(f)(1).

⁵⁵ Federico Cheever, *Recovery Planning: The Courts and the Endangered Species Act*, NAT. RESOURCES & ENV’T, Fall 2001, at 106, 108; see *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69, 72 (2004); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996); *Strahan v. Linnon*, 967 F. Supp. 581, 591 (D. Mass. 1997); *Nat’l Audubon Soc’y v. Hester*, 801 F.2d 405, 408 (D.D.C. 1995); *Nat’l Wildlife Fed’n v. Nat’l Park Serv.*, 669 F. Supp. 384, 392 (D. Wyo.

1986 the D.C. Circuit found in *National Audubon Society v. Hester* that the FWS was justified in abandoning its recovery plan for the California condor.⁵⁶ The FWS implemented a recovery plan calling for both extensive tracking efforts and a captive propagation program, in response to studies indicating that the condor population had been decimated to a mere twenty-six specimens.⁵⁷ An alarming series of discoveries showing that the condors were even more imperiled than originally thought, however, caused the FWS to promptly abandon its recovery plan in favor of total captive propagation.⁵⁸ After reviewing the district court's decision, the D.C. Circuit found that the FWS's failure to follow its recovery plan was legally permissible.⁵⁹ The court reasoned that the FWS lawfully exercised its absolute discretion to alter the plan in response to changing circumstances.⁶⁰

Similar to the D.C. Circuit, other courts generally decline to treat recovery plans as legally binding.⁶¹ In 1996, in *Fund for Animals, Inc. v. Rice*, the Eleventh Circuit Court of Appeals found in favor of the defendants in a suit filed by environmental groups seeking to prevent construction of a municipal landfill on a wetlands site alleged to be the habitat of the endangered Florida Panther.⁶² The court rejected the plaintiffs' claim that the FWS and U.S. Army Corps of Engineers violated the ESA by failing to implement the panther's 1987 recovery plan, reasoning that that the practical effect of the plaintiffs' position would be to mistakenly treat the recovery plan as a document carrying the force of law.⁶³ Under the court's interpretation, "recovery plans are for guidance purposes only."⁶⁴ As the court succinctly articulated, "[b]y providing general guidance as to what is required in a recovery plan, the ESA 'breathe[s] discretion at every pore.'"⁶⁵

In 1997, the District Court for the District of Massachusetts, grappling with the same issue in *Strahan v. Linnon*, concluded that the "[c]ase law instructs that the defendants [were] correct in their asser-

1987). *But see* *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353, at *11 (W.D. Tex. Feb. 1, 1993) (declining to hold recovery plans unenforceable).

⁵⁶ 801 F.2d 405, 408 (D.C. Cir. 1986).

⁵⁷ *Id.* at 405-06.

⁵⁸ *Id.* at 406.

⁵⁹ *Id.* at 408.

⁶⁰ *Id.*

⁶¹ ENVTL. LAW INST., *supra* note 45, § 23:22.

⁶² 85 F.3d 535, 535, 548 (11th Cir. 1996).

⁶³ *Id.* at 547.

⁶⁴ *Id.*

⁶⁵ *Id.* (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

tion that the content of recovery plans is discretionary.”⁶⁶ The court held that the National Marine Fisheries Service’s failure to adopt the exact measures provided for in its recovery plan for the Right whale did not render the plan deficient.⁶⁷ In fact, the court reasoned that such agency decisions should be afforded significant deference, particularly in cases involving expert, scientific judgment.⁶⁸

Similarly, ten years earlier, the District Court for the District of Wyoming similarly rejected the plaintiff’s argument that the ESA obligates the Secretary to strictly adhere to and abide by implemented recovery plans.⁶⁹ In *National Wildlife Federation v. National Park Service*, the court upheld the National Park Service’s decision to keep open a Yellowstone National Park campsite, despite the presence of threatened grizzly bear species.⁷⁰ The court implicitly held that the Secretary could, in effect, selectively decide which provisions of the grizzly bear recovery plan to enforce.⁷¹ The court pointedly announced that it would “not attempt to second guess the Secretary’s motives for not following the recovery plan,” and in doing so affirmed the general presumption of secretarial discretion.⁷²

In the broader context of environmental law, it is generally understood that plans designed to protect the environment are implemented for guidance purposes only.⁷³ In *Norton v. Southern Utah Wilderness Alliance*, environmental groups sued the Bureau of Land Management (BLM) in response to a perceived failure to protect public lands from environmental damage caused by off-road vehicle use.⁷⁴ In finding for

⁶⁶ 967 F. Supp. 581, 597 (D. Mass. 1997).

⁶⁷ *Id.* at 598.

⁶⁸ *Id.*

⁶⁹ *Nat’l Wildlife Fed’n v. Nat’l Park Serv.*, 669 F. Supp. 384, 388 (D. Wyo. 1987).

⁷⁰ *Id.* at 392.

⁷¹ *Id.* at 388.

⁷² *Id.*; but see *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353, at *11 (W.D. Tex. Feb. 1, 1993) (restricting the NWF’s secretarial discretion). A rare outlier, in *Sierra Club v. Lujan*, the District Court for the Western District of Texas found that the provision permitting temporary delay of recovery plan implementation does not grant the Secretary authority to do so indefinitely. 1993 WL, 151353 at *11; Eric Helmy, Comment, *Teeth for a Paper Tiger: Redressing the Deficiencies of the Recovery Provisions of the Endangered Species Act*, 30 ENVTL. L. 843, 855–56 (2000).

⁷³ See, e.g., Dave Owen, *Probabilities, Planning Failures, and Environmental Law*, 84 TUL. L. REV. 265, 275–76, 283–85 (2009) (characterizing fishery management plans as largely discretionary and Clean Air Act State Implementation plans as providing nonbinding guidance); George B. Wyeth, *The “Regulation by Guidance” Debate: An Agency Perspective*, 9 NAT. RESOURCES & ENV’T, Spring 1995, at 52, 53 (identifying Comprehensive Environmental Response, Compensation, and Liability Act National Contingency Plans as providing nonbinding guidance).

⁷⁴ 542 U.S. 55, 61 (2004).

the defendant, the Supreme Court held that the BLM's land use plan did not have the force of law and was thus nonbinding.⁷⁵ The Court explicitly stated that such plans are “designed to guide . . . future . . . actions,” not compel them.⁷⁶

III. ANALYSIS

The Court of Appeals for the D.C. Circuit held in *Friends of Blackwater v. Salazar* that the U.S. Fish & Wildlife Service's (FWS) reliance on persistence, as opposed to population data, did not render its delisting decision arbitrary and capricious.⁷⁷ The court explained that in the absence of existing, reliable population-based data, the FWS was not obligated to conduct an independent study, but rather was permitted to rely upon the best data available.⁷⁸ The majority further determined that the FWS's consideration of all five types of threats in the listing criteria provision of the Endangered Species Act (ESA), as a whole, constituted a reasonable consideration of the adequacy of existing regulatory mechanisms.⁷⁹

The most important issue before the court, however, concerned the legal enforceability of recovery plans.⁸⁰ The D.C. Circuit held that the criteria in the recovery plan provision—unlike the enumerated factors in the listing criteria provision of the ESA—are nonbinding.⁸¹ The court rejected a Friends of Backwater argument that the Act's statutory language evidences congressional intent that complete satisfaction of

⁷⁵ *Id.* at 69, 72.

⁷⁶ *Id.* at 69 (quoting 43 C.F.R. § 1601.0-2 (2003)).

⁷⁷ 691 F.3d 428, 435 (D.C. Cir. 2012).

⁷⁸ *Id.* at 435 (citing *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir. 2000)). In *Southwest Center for Biological Diversity v. Babbitt*, the D.C. Circuit expounded upon the ESA's best available data provision. 215 F.3d at 60. The court heard the issue of whether the FWS's determination of the species' listing status required the FWS to conduct on-site specimen counts of the Queen Charlotte goshawk population. *Id.* at 59. The D.C. Circuit held that the district court was without authority to order the Secretary to conduct independent population counts. *Id.* at 60. The court explained that the best available data standard “merely prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence he relies on.” *Id.* (quoting *City of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989)).

⁷⁹ *Friends of Blackwater*, 691 F.3d at 436 (noting the FWS was not required to consider the adequacy of existing regulatory mechanisms in isolation); see 16 U.S.C. § 1533(a) (1) (2006).

⁸⁰ See *Friends of Blackwater*, 691 F.3d at 432. The court's holding with respect to this issue also serves as the focal point of the foregoing analysis. As such, all ancillary issues and holdings fall outside the scope of this inquiry.

⁸¹ *Id.* at 432, 436.

recovery plan criteria is a necessary precondition to delisting.⁸² Instead, the D.C. Circuit found that objective, measurable criteria “are predictive of the [FWS’s] delisting analysis rather than controlling that analysis.”⁸³ The court reasoned that the recovery plan provision is devoid of language affirmatively mandating that the FWS consult the recovery plan criteria in making a delisting decision.⁸⁴ Unlike the listing criteria provision, 4(a)(1), which explicitly demands that the secretary *shall* consider the five enumerated statutory factors prior to making a decision; the recovery plan provision, section 4(f) merely provides that the recovery plan criteria should be that “which when met would result in a determination . . . that the species be removed from the list.”⁸⁵ The majority explicated that this future conditional language expresses a sufficient, but not necessary, condition.⁸⁶ The court therefore deemed the Act silent and ambiguous as to what happens when the criteria are not satisfied.⁸⁷

The majority also repudiated the dissent’s contention that interpreting section 4(f) as nonbinding renders the recovery plan requirement superfluous.⁸⁸ The court asserted to the contrary that the plan’s objective, measurable criteria, even if nonbinding, nevertheless provides a valuable gauge by which to evaluate the FWS’s progress toward the goal of species conservation.⁸⁹

From the myopic perspective of proper statutory interpretation and precedential analysis—that is, irrespective of the resultant implications—the D.C. Circuit decided *Friends of Blackwater* correctly.⁹⁰ The weight of the case law, both binding and persuasive, in conjunction with a coherent examination of the relevant statutory text, compels the

⁸² *Id.* at 437; see 16 U.S.C. § 1533(f)(B)(ii) (2006) (“The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable—incorporate in each plan—objective measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list.”).

⁸³ *Friends of Blackwater*, 691 F.3d at 433.

⁸⁴ See *id.* at 432–33.

⁸⁵ *Id.* at 432–33 (quoting 16 U.S.C. § 1533(f)(1)(B)(ii) (2006)).

⁸⁶ *Id.* at 437.

⁸⁷ *Id.*

⁸⁸ *Id.* at 434, *id.* at 445–46 (Rogers, J., dissenting). The dissent argued that under the majority’s interpretation, the FWS can proceed to delist a species pursuant to section 4(a) without regard to the requirements of sections 4(f)(1) and (4), thus rendering those sections meaningless. *Id.* at 446 (Rogers, J., dissenting).

⁸⁹ *Friends of Blackwater*, 691 F.3d at 434 (majority opinion).

⁹⁰ *Id.* at 436 (finding that recovery plan criteria need not be satisfied before delisting); see, e.g., *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 535, 547 (11th Cir. 1996) (holding that recovery plans are nonbinding).

conclusion that recovery plans lack legal enforceability.⁹¹ The FWS was justified in abandoning the West Virginia northern flying squirrel's recovery plan in the sequence of events leading up to *Friends of Blackwater v. Salazar*, like it was in jettisoning the California condor's original recovery plan—in favor of increased protection—prior to *National Audubon Society v. Hester*.⁹² In both cases the FWS permissibly exercised its discretionary authority—granted by the ESA—in response to changing circumstances regarding the respective species' statuses.⁹³ As one commentator accurately noted in the wake of the *National Audubon Society* decision, “[b]y condoning an administrative action that contravened a promulgated recovery plan, National Audubon Society granted the Secretary almost unlimited discretion with respect to recovery plan implementation.”⁹⁴ Consequently, the D.C. Circuit's proper application of binding precedent to analogous facts in *Friends of Blackwater* compels the conclusion that satisfaction of recovery plan criteria is discretionary.⁹⁵

Although not similarly bound by decisions of courts outside its jurisdiction, the D.C. Circuit's holding in *Friends of Blackwater* nevertheless comports with the general consensus of other federal courts.⁹⁶ The persuasive authority of decisions such as *Fund for Animals, Inc. v. Rice* in the Eleventh Circuit, *Strahan v. Linnon* in the District Court of Massachusetts, and *National Wildlife Federation v. National Park Service* in the District Court of Wyoming suggests that the D.C. Circuit correctly interpreted recovery plans as nonbinding.⁹⁷ These decisions demonstrate

⁹¹ See, e.g., *Nat'l Audubon Soc'y v. Hester*, 801 F.2d 405, 408 (D.C. Cir. 1986) (declaring recovery plans discretionary in nature); see also ENVTL. LAW INST., *supra* note 45, § 23:22.

⁹² Compare *Friends of Blackwater*, 691 F.3d at 436 (upholding delisting despite the failure to satisfy all recovery plan criteria permissible), with *Nat'l Audubon Soc'y*, 801 F.2d at 408 (validating the legality of the FWS's decision to take action not provided for in the recovery plan).

⁹³ See *Friends of Blackwater*, 691 F.3d at 436; *Nat'l Audubon Soc'y*, 801 F.2d at 408.

⁹⁴ Helmy, *supra* note 72, at 854.

⁹⁵ See *Friends of Blackwater*, 691 F.3d at 436; *Nat'l Audubon Soc'y*, 801 F.2d at 408. These cases are factually analogous in the sense that the FWS, in both instances, abandoned the species' original recovery plans on account of changing circumstances that rendered those plans deficient. *Friends of Blackwater*, 691 F.3d at 436; *Nat'l Audubon Soc'y*, 801 F.2d at 408.

⁹⁶ Compare *Friends of Blackwater*, 691 F.3d at 436 (upholding the agency's decision to abandon the West Virginia northern flying squirrel's recovery plan on the grounds that such plans are nonbinding), with *Fund for Animals*, 85 F.3d at 547–48 (finding the agency's decision not to implement the Florida Panther's recovery plan justifiable because recovery plans lack the force of law); see also ENVTL. LAW INST., *supra* note 45, § 23:22.

⁹⁷ See *Friends of Blackwater*, 691 F.3d at 436; *Fund for Animals*, 85 F.3d at 547; *Strahan v. Linnon*, 967 F. Supp. 581, 597 (D. Mass. 1997); *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384, 388 (D. Wyo. 1987).

the tendency of courts to defer to agency judgment—a trend justified by the fact that agencies provide concentrated, professional expertise.⁹⁸ Thus, the D.C. Circuit’s deference to the FWS’s decision that the West Virginia northern squirrel no longer qualified as endangered, despite its failure to satisfy all recovery plan criteria, harmonizes with the District Court of Massachusetts’s acquiescence to expert, scientific judgment and District Court of Wyoming’s unwillingness to second guess agency decision-making.⁹⁹ This result moreover accords with step two of the *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* analysis whereby a reviewing court defers to the agency’s interpretation provided that it reflects a “permissible construction of the statute.”¹⁰⁰

The dissent ardently insisted that the majority’s interpretation has the practical consequence of rendering recovery plan criteria superfluous.¹⁰¹ This argument appears compelling at first blush, especially in light of the Supreme Court’s decree that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”¹⁰² The D.C. Circuit, however, assuages any such concern by explicating that recovery plan criteria, though nonbinding, is nevertheless critical to evaluating the FWS’s progress toward the ultimate goal of species conservation.¹⁰³ In advancing this position, the court cited the Supreme Court’s holding in *Norton v. Southern Utah Wilderness Alliance* and implicitly analogized the recovery plan provision, 4(f), of the ESA to the statutory provision, requiring the BLM to promulgate land use plans.¹⁰⁴ The court reasoned that section 4(f), like the relevant statute in the Supreme Court case, does not have binding legal effect.¹⁰⁵ Thus, just as land use plans are tools by which to project present and future land use, recovery plans

⁹⁸ See, e.g., *Strahan*, 967 F. Supp. at 598 (“Indeed, especially when expert, scientific judgements are involved, the court must afford the agency’s decision a great deal of deference.”); *Nat’l Wildlife Fed’n*, 669 F. Supp. at 389 (“This court will not attempt to second guess the Secretary’s motives for not following the recovery plan.”); ALEXANDER J. CELLA ET AL., 40 MASS. PRACTICE, ADMIN. LAW & PRACTICE § 1639 (2012).

⁹⁹ See *Friends of Blackwater*, 691 F.3d at 436; see *Strahan*, 968 F. Supp. at 598; *Nat’l Wildlife Fed’n*, 669 F. Supp. at 389.

¹⁰⁰ See 467 U.S. 827, 843 (1984).

¹⁰¹ *Friends of Blackwater*, 691 F.3d at 445 (Rogers, J., dissenting).

¹⁰² *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 181–86 (rev. 6th ed. 2000)).

¹⁰³ *Friends of Blackwater*, 691 F.3d at 434.

¹⁰⁴ See 542 U.S. 55, 69 (2004); *Friends of Blackwater*, 691 F.3d at 434.

¹⁰⁵ See *Friends of Blackwater*, 691 F.3d at 434.

comparably gauge and project progress toward species recovery.¹⁰⁶ As one commentator similarly suggested, “[t]heir function is not to provide an enforceable ‘to do’ list binding federal agencies,” instead recovery plans “provide the lens through which federal agencies apply the general provisions of the law to the plight of specific species.”¹⁰⁷ Consequently, the court was logically justified in reaching its conclusion that “[a] plan is a statement of intention, not a contract.”¹⁰⁸

Focusing exclusively on statutory construction, the portion of section 4(f) providing for the implementation of objective, measurable recovery plan criteria “which, when met would result in a determination . . . that the species be removed from the list” is seemingly susceptible to two—though not equally plausible—readings.¹⁰⁹ The dissent’s interpretation of this language would impose a binding constraint upon the FWS’s delisting analysis.¹¹⁰ Although the dissent’s interpretation is reasonable, the majority’s interpretation of recovery plans as merely instructive must prevail in light of the directive that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹¹¹ In drafting this section, the legislature chose the word *would* as opposed to *will*.¹¹² As noted by the majority, this choice of future conditional tense has the effect of rendering satisfaction of the recovery plan criteria a sufficient, but not necessary precondition to delisting.¹¹³ Thus, the dissent’s interpretation is only

¹⁰⁶ See *Norton*, 542 U.S. at 69; *Friends of Blackwater*, 691 F.3d at 434. The court noted the FWS “fairly analogizes a recovery plan to a map or a set of directions that provides objective and measurable steps to guide a traveler to his destination. . . . Although a map may help a traveller chart his course, it is the sign at the end of the road, here the five statutory factors indicating recovery . . . that tells him his journey is over.” *Friends of Blackwater*, 691 F.3d at 434; see also *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834, 835 (D.D.C. 1992) (stating that recovery plans have never been action documents). The court further stated that “[the recovery plan] left open different approaches and contemplated that when an agency or group made specific proposals for achieving a particular objective of the plan, there would be a need for further study.” *Id.*

¹⁰⁷ See Cheever, *supra* note 55, at 135.

¹⁰⁸ See *Friends of Blackwater*, 691 F.3d at 434.

¹⁰⁹ See 16 U.S.C. § 1533(f)(1)(B)(ii) (2006); *Friends of Blackwater*, 691 F.3d at 433.

¹¹⁰ *Friends of Blackwater*, 691 F.3d at 442–43 (Rogers, J. dissenting).

¹¹¹ See; *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992); *Friends of Blackwater*, 691 F.3d at 434. Additionally, the preceding qualifying phrase “to the maximum extent practicable” indicates nonbinding discretion. *Friends of Blackwater*, 691 F.3d at 433 (citing *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1253–54 (10th Cir. 1998)).

¹¹² See 16 U.S.C. § 1533(f)(1)(B)(ii).

¹¹³ *Friends of Blackwater*, 691 F.3d at 437.

tenable under a hypothetical reading that substitutes the word *will* in place of *would*.¹¹⁴

Although the D.C. Circuit correctly interpreted the ESA's recovery plan criteria as nonbinding, this case nevertheless demonstrates that proper statutory construction does not always guarantee desirable results.¹¹⁵ Despite the soundness of the majority's interpretation of the text's plain meaning, concerning policy implications nevertheless abound.¹¹⁶ Most notably, that recovery plans lack the force of law significantly hinders the efficacy of the ESA's protection of endangered and threatened species.¹¹⁷ The holding of *Friends of Blackwater* specifically states that "the Secretary reasonably interpreted the Endangered Species Act as not requiring that the criteria in a recovery plan be satisfied before a species may be delisted pursuant to the factors in the Act itself."¹¹⁸ This holding, however, potentially has broader reach and can therefore be extended to apply in situations beyond the scope of this particular case.¹¹⁹

Thus, the recovery plan provision is but a paper tiger—lacking the necessary teeth of enforceability.¹²⁰ If the legislature intended, contrary to what it actually articulated, that recovery plan criteria be legally binding, clarification by means of statutory amendment is a necessary remedial recourse.¹²¹ Other methods of redress, while plausible, merely circumvent the problematic statutory language.¹²² Legislative amendment offers the distinct advantage of being the most direct means of redressing the current deficiency.¹²³ The benefit of directness cannot be overstated within the context of a situation already plagued by crippling uncertainty and ambiguity.¹²⁴

¹¹⁴ See *id.* at 437, *id.* at 442–43 (Rogers, J. dissenting). Or, alternatively the dissent's interpretation is plausible if the qualifying word *only* is read into the statute "which, [only] when met, would result . . ." *Id.* at 437 (majority opinion).

¹¹⁵ See *id.* at 436, *id.* at 452 (Rogers, J. dissenting).

¹¹⁶ See *id.* at 452 (Rogers, J. dissenting); Helmy, *supra* note 72, at 854; Philip Kline, Comment, *Grizzly Bear Blues: A Case Study of the Endangered Species Act's Delisting Process and Recovery Plan Requirements*, 31 ENVTL. L. 371, 375 (2001).

¹¹⁷ See *Friends of Blackwater*, 691 F.3d at 452 (Rogers, J. dissenting).

¹¹⁸ *Id.* at 436 (majority opinion).

¹¹⁹ See *id.*

¹²⁰ Helmy, *supra* note 72, at 845.

¹²¹ See 16 U.S.C. § 1533(f)(1) (2006).

¹²² Helmy, *supra* note 72, at 856–57, 858 (suggesting the promotion of recovery through separate provisions of the ESA).

¹²³ *Id.* at 856.

¹²⁴ See *Friends of Blackwater*, 691 F.3d at 433, 437.

CONCLUSION

It is undeniable that the Endangered Species Act has played an integral role in effecting the conservation and recovery of countless endangered and threatened species in the forty some-odd years since its enactment.¹²⁵ This is not to say the Act cannot do better, however. Although most courts, including the D.C. Circuit, have correctly recognized recovery plans as nonbinding guidance mechanisms, this interpretation begs the critical question of whether guidance alone is enough. If the answer to this question is no, Congress must amend the text of section 4(f) of the ESA to impute the force of law on recovery plan criteria. Such an amendment is necessary on account of the stark reality that the collective fates of untold species, such as the West Virginia northern flying squirrel, lie in the balance.

¹²⁵ Jason C. Rylander, Comment, *Recovering Endangered Species in Difficult Times: Can the ESA Go Beyond Mere Salvage?*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10017, 10018 (2012).